

JUN 14 1979

MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
1978 TERM

No. 78-6839

EDDIE GORDON,

Petitioner,

-against-

NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF
NEW YORK, APPELLATE DIVISION, SECOND
DEPARTMENT

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The petitioner, Eddie Gordon, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Appellate Division of the Supreme Court of the State of New York, Second Department, entered February 5, 1979, affirming a judgment of the Supreme Court, Kings County, rendered on July 29, 1977, convicting him of manslaughter in the first degree [New York Penal Law §125.20 (McKinney, 1975)] and sentencing him to an indeterminate term of imprisonment with a minimum of eight and one-third years and a maximum of twenty-five years.

OPINIONS BELOW

The opinion of the Appellate Division, Second Department is not yet officially reported and is unofficially reported at 413 N.Y.S.2d 29 (1979). The order of affirmance and opinion are annexed as Appendix A. The opinion of the Supreme Court, Kings County on the motion to suppress is not reported and is set forth as Appendix C.

JURISDICTION

The judgment and the order of the Appellate Division was entered on February 5, 1979. Leave to appeal to the New York Court of Appeals was denied by Associate Judge Jacob D. Fuchsberg on March 19, 1979. A copy of the certificate denying leave to appeal to the Court of Appeals

is annexed as Appendix B. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

Whether the warrantless arrest of petitioner within a private dwelling and the seizure of a gun from beneath a mattress incident to that arrest deprived petitioner of his rights under the Fourth Amendment.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendments IV and XIV.

STATEMENT OF THE CASE

As early as December 15, 1976, petitioner was a suspect in the homicide of a James Lawrence and in the attempted homicide of one Ignacia Torruella. On that date Mr. Torruella made a photographic identification of petitioner, and the police learned not only petitioner's name but also what neighborhood he frequented.

Petitioner had been living for a few days with his common-law wife, Diane McMoore, and their daughter in a Brooklyn brownstone. On December 21, 1976, Ms. McMoore's mother, who lived elsewhere, telephoned the police to inform them of petitioner's whereabouts. Within five minutes after the call, a contingent of police officers and detectives proceeded to the premises. Four detectives entered the building while others remained outside to insure against petitioner's escape.

When the detectives reached the apartment they knocked on the door and identified themselves. They heard a woman answer, "Just a moment," and heard the sounds of "milling around." After a few moments, the detectives knocked and once more announced, "Police." When there was no response, they broke down the door. They had not obtained either an arrest or search warrant.

With their guns drawn, the four detectives entered the apartment. Two detectives, moving toward the front of the apartment, discovered petitioner, dressed only in his underwear, in a closed closet. After frisking petitioner, the police placed him under arrest, told him to dress, and then accompanied him to the bedroom at the front of the house. Then, just before petitioner sat on the bed to put on his socks, a policeman lifted the mattress and found a gun.

On December 28, 1976, petitioner was indicted by a Kings County Grand Jury for murder, attempted murder and criminal possession of a weapon.

Defense counsel moved to suppress the gun on the ground, inter alia, that the police entry, without a search warrant or an arrest warrant, was improper. The hearing court found that the police had probable cause both to arrest petitioner and to search his wife's apartment. It ruled that probable cause was based on the photographic identification by Mr. Torruella, the telephone call from Ms. McMoore's mother, and the fact that after announcing their arrival the police had to wait outside Ms. McMoore's door as they heard "sounds of milling around" from within the apartment. In view of the seriousness of the crimes under investigation, the court held that the actions of the police were reasonable and the arrest lawful. Consequently, it denied the motion to suppress. (App. C at pp. 2-4).

On June 30, 1977 petitioner entered a plea of guilty to manslaughter in the first degree, to cover the entire indictment, and on July 29, 1977 the court sentenced petitioner to an indeterminate prison term with a minimum of eight and one-third years and a maximum of twenty-five years.

Because petitioner's plea of guilty did not waive his Fourth Amendment claim [New York Criminal Procedure Law §710.70(2)], he appealed the denial of his motion to suppress. On February 5, 1979 the Appellate Division, Second Department affirmed his conviction on the authority of People v. Payton, 45 N.Y.2d 300 (1978) (App. A). Leave to appeal to the Court of Appeals was denied on March 19, 1979 (App. B).

REASONS FOR GRANTING THE WRIT

The warrantless arrest of petitioner in a private dwelling in which he was lawfully present violated the Fourth Amendment and raises the same constitutional issue as is before the Court in Payton v. New York, No. 78-5420 and Riddick v. New York, No. 78-5421, set for reargument during the October, 1979 Term. In affirming petitioner's conviction, the Appellate Division relied on the majority opinion of the Court of Appeals in Payton. App. A, p. 2. It is thus respectfully submitted that this case be held in abeyance until those cases are decided.

The circumstances surrounding petitioner's arrest are similar to those in Payton. In each case the police broke down the door to a home to effect a warrantless arrest. In Payton, the police made the

warrantless entry the morning after the defendant was identified as a suspect in a homicide case. At the time of petitioner's arrest, however, the police had had probable cause for his arrest for almost a week. There was also no showing that exigent circumstances existed which would justify a failure to obtain a warrant.

CONCLUSION

This case should be held in abeyance pending the Court's decision in Payton v. New York, No. 78-5420 and Riddick v. New York, No. 78-5421 and should be disposed of in accordance with the outcome of those cases.

Respectfully submitted,

WILLIAM E. HELLERSTEIN
Counsel for Petitioner

MARTHA L. CONFORTI
Of Counsel
June, 1979

At a Term of the Appellate Division of the Supreme Court
of the State of New York, Second Judicial Department,
held in Kings County on February 5, 1979

E/ms

HON. MILTON MOLLEN, Presiding Justice,
HON. VINCENT D. DAMIANI,
HON. CHARLES MARGETT,
HON. M. HENRY MARTUSCELLO.

Associate Justices

The People of the State of New York.

Respondent.

v.

Order on Appeal from
Judgment of Conviction

Eddie Gordon,

Appellant

In the above entitled action, the above named Eddie Gordon,

defendant in this action, having appealed to this court from a judgment of the Supreme

Court. Kings County, rendered July 29, 1977, convicting him of
manslaughter in the first degree, upon his plea of guilty, and
imposing sentence; the appeal also brings up for review the denial
of defendant's motion to suppress certain physical evidence;

and the said appeal having been submitted by Martha L. Conforti,

Esq., of counsel for the appellant, and submitted by Suzan Picariello, Esq.,

of counsel for the respondent, and due deliberation having been had thereon; and upon this court's
opinion and decision slip heretofore filed and made a part hereof, it is:

ORDERED that the judgment appealed from is hereby unanimously affirmed.

Enter:

Clerk of the Appellate Division

MILTON MOLLEN, P.J.
VINCENT D. DAMIANI
CHARLES MARGETT
M. HENRY MARTUSCELLO, JJ.

AD2d

S January 23, 1979

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The People, etc., respondent,
v. Eddie Gordon, appellant.
(Ind. No. 4037/76)

William E. Hellerstein, New York, N.Y. (Martha L.
Conforti of counsel), for appellant.

Eugene Gold, District Attorney, Brooklyn, N.Y.
(Suzan Picariello of counsel; Adrian Mecz on the
brief), for respondent.

Appeal by defendant from a judgment of the Supreme Court, Kings
County (BARSHAY, J.), rendered July 29, 1977, convicting him
of manslaughter in the first degree, upon his plea of guilty,
and imposing sentence. The appeal also brings up for review
the denial of defendant's motion to suppress certain physical
evidence.

Judgment affirmed.

The record shows that at the suppression hearing defense counsel
either conceded the identity and reliability of the telephone
caller who informed the police of defendant's address, or
waived the potential issue with respect thereto. The police
had probable cause to enter the apartment where the defendant
was found and arrested and, under the circumstances, did not
violate defendant's constitutional right to be secure from
unreasonable searches and seizures (see People v Payton,
45 NY2d 300). The motion to suppress physical evidence was
thus properly denied.

We have considered the other contentions raised by defendant
and find them to be without merit.

MOLLEN, P.J., DAMIANI, MARGETT and MARTUSCELLO, JJ., concur.

February 5, 1979

PEOPLE v GORDON, EDDIE

46 E

ASSIGNED TO THE
CLERK OF THE APPELLATE DIVISION

State of New York Court of Appeals

BEFORE: HON. JACOB D. FUCHSBERG, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

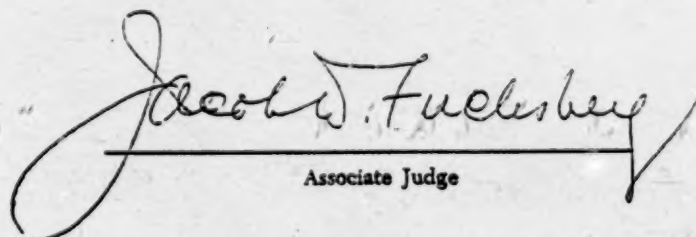
against

EDDIE GORDON

CERTIFICATE DENYING LEAVE

I, JACOB D. FUCHSBERG, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Albany , New York
March 19 , 19 79


Associate Judge

Order of the Appellate Division, Second Department
dated February 5, 1979 affirming judgment of Supreme
Court Kings County rendered July 29, 1977.

*Description of Order:

APPENDIX C

DECISION OF THE SUPREME COURT, KINGS COUNTY

BARSHAY, J.

Defendant has been indicted for felony murder. He now moves to suppress the tangible evidence, a gun. A hearing was held before this court and based upon the evidence adduced at the hearing, the following are the findings of fact and conclusions of law:

On or about December 15, 1976, Detective Arthur Walsh, from the 12th Homicide Zone, was assigned to investigate the death of James Lawrence, who died as the result of a gun shot in the back of the head. Upon being assigned to the case, Detective Walsh had a conversation with Ignacia Torruella on December 15, 1976 at Brookdale Hospital. Mr. Torruella was a gun-shot wounded victim of the crime in which Mr. Lawrence was shot to death. Detective Walsh showed Torruella a number of photographs, among which there was included a picture of the defendant. Torruella identified the picture of the defendant as being the person who shot him. Torruella also told the detective that the defendant's street name was "Eddie" and that he had known him for about one year.

On December 21, 1976 Detective Walsh received a telephone call from the mother of Diane McMoore, defendant's common-law wife, who stated that the defendant was in an apartment located at 2989 Fulton Street, Brooklyn, New York. Walsh, without a search or arrest warrant, proceeded to that address with approximately seven other police officers. He knocked on the door of the apartment and identified himself and his colleagues as police officers. They were told by a female voice to wait one minute. After waiting a few minutes, the police officers heard some milling around inside the apartment. They again knocked on the door and hearing no response, they broke down the door and entered the apartment.

Upon entering the apartment, the officers observed the defendant, dressed in his underwear, inside a closet whose door was open. The officers identified the defendant as the man they were looking for, after looking at the picture they had in their possession that Mr. Torruella previously picked out. At this point defendant was placed under arrest and told to get dressed.

The officers accompanied the defendant into an adjoining bedroom and told him to put on his clothes which were next to the bed. Before the defendant sat down on the bed to put on his socks, a Detective Jacobson told him to wait as Jacobson proceeded to lift up the mattress because he "wanted to make sure it was safe" (hearing minutes, p. 66). Jacobson flipped the mattress and found a gun.

Defendant now contends that the seizure of the gun violated constitutional demands because it was not within the area from which the police officers "might obtain weapons or evidentiary items" as prescribed by Chimel v. California (395 U.S. 752). He further maintains that the entry into the apartment was unconstitutional because it was accomplished without a search or arrest warrant and without probable cause to believe that he was in the apartment. This court finds that defendant's arguments are completely devoid of merit.

The admissibility of evidence seized in a search incident to an arrest depends on the lawfulness of the arrest (People v. Floyd, 26 N.Y.2d 558). It is well settled that an arrest made without a warrant, as is the case here, is lawful provided there is the existence of probable cause to make the arrest.

The basic test of probable cause to arrest is the amount of information possessed by law enforcement officers at the time of the arrest (see Beck v. Ohio, 379 U.S. 89). "The substance of all the definitions of probable cause is a reasonable ground for a belief of guilt * * * and this means less than evidence which would justify condemnation or conviction * * *. Probable cause exists where the facts and circumstances within * * * [the officers'] knowledge, and of which they have reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." (Brinegar v. U.S., 338 U.S. 160, 175).

In determining whether probable cause existed to arrest the defendant herein, the court must first take into account the police officers' conduct leading to the arrest. A review of the record shows that the police had reasonable cause, prior to their entry, to search the apartment located at 2989 Fulton Street, Brooklyn, New York, without a warrant: First, they were able to obtain a photographic identification of the defendant from one of the victims of the crime. Second, they

received a telephone call from the mother of the defendant's common law wife, informing them that defendant could be located at the Fulton Street address. Third, upon arriving at the apartment and announcing their presence, the officers were forced to wait outside a few minutes during which time they heard sounds of milling around inside the apartment. The totality of the circumstances present herein leads this court to find that the facts available to the police officers at the time of their entry into the apartment would warrant a person of reasonable caution in believing that the action was appropriate. There was nothing unreasonable about this type of police response considering the seriousness of the crime under investigation.

The arrest of the defendant followed the police officers' entry into the apartment. Upon entering, the officers observed defendant inside an open closet. After comparing the defendant to the photograph that Mr. Torruella earlier picked out in identifying the defendant, the officers determined that the defendant was the suspect they were looking for. It was at this point, that the amount of information possessed by the police officers rose to the level of probable cause to arrest the defendant. Thus, although the arrest was without a warrant, the court finds that it was lawful.

Where there exists a lawful arrest, a valid warrantless search may be made as an incident thereof. The justification for this search power and the limitations on its exercise were set forth in Chimel v. California, supra. In this case the Supreme Court held that the incidental search is limited to the arrestee's person and to the area within his immediate control. The court stated that "[w]hen an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or to effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. * * * There is ample justification, therefore, for a search of the arrestee's person and the

area 'within his immediate control' - construing that phrase to mean the area from within which he might gain possession of a weapon * * *." (Chimel, pp. 762-763).

In the instant case, defendant, who was already placed under arrest, was about to sit down on the bed when Detective Jacobson flipped the mattress and discovered the gun. This search was reasonably limited by the need to seize weapons and to prevent the destruction of evidence. There was no search of the whole apartment. The only search that occurred was under the mattress - a mattress that the defendant was standing right next to. The scope of the search was, therefore, reasonable under the Fourth and Fourteenth Amendments.

Clear and convincing evidence of probable cause to arrest the defendant without a warrant was present and the search that took place as an incident thereof was lawful.

Accordingly, defendant's motion to suppress the tangible evidence, a gun, is denied.

/s/ HYMAN BARSHAY
J.S.C.